

22/682

LAW OFFICE  
**THOMAS F. MCFARLAND, P.C.**  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1112  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
*mcfarland@aol.com*

THOMAS F. MCFARLAND

February 25, 2008

By e-filing

Anne K. Quinlan, Esq  
Acting Secretary  
Surface Transportation Board  
395 E Street, S W, Suite 1149  
Washington, DC 20024

Re Finance Docket No 35111, *South Plains Switching, Ltd Co -- Compensation For Use Of Facilities In Alternative Rail Service -- West Texas and Lubbock Railway Company*

Dear Ms Quinlan

Hereby transmitted is a Reply to Opening Memorandum for filing with the Board in the above referenced matter

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
*Attorney for South Plains  
Switching, Ltd Co*

7McF kt wp8 01/199efstb6

-  
BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

SOUTH PLAINS SWITCHING, LTD CO     )  
- COMPENSATION FOR USE OF     ) - FINANCE DOCKET  
FACILITIES IN ALTERNATIVE RAIL     ) NO 35111  
SERVICE - WEST TEXAS AND     )  
LUBBOCK RAILWAY COMPANY     )

---

REPLY TO OPENING MEMORANDUM

---

SOUTH PLAINS SWITCHING, LTD CO  
P O Box 64299  
Lubbock, TX 79464-4299

Petitioner

THOMAS F McFARLAND  
THOMAS F McFARLAND, P C  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204  
(312) 201-9695 (fax)  
mcfarland@aol.com

Attorney for Petitioner

DATE FILED February 25, 2008

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

SOUTH PLAINS SWITCHING, LTD CO     )  
-- COMPENSATION FOR USE OF         ) - FINANCE DOCKET  
FACILITIES IN ALTERNATIVE RAIL     ) NO 35111  
SERVICE -- WEST TEXAS AND         )  
LUBBOCK RAILWAY COMPANY            )

---

REPLY TO OPENING MEMORANDUM

---

Pursuant to the Board's procedural decision served on January 11, 2008, Ordering Paragraph 3, SOUTH PLAINS SWITCHING, LTD CO (SAW) hereby replies to an "Opening Memorandum" filed in behalf of West Texas & Lubbock Railway Company (WTLC) and PYCO Industries, Inc (PYCO) on February 11, 2008

**STATEMENT OF POSITION**

As explained in SAW's initial filing on compensation, the *Dardanelle*<sup>1/</sup> criteria do not result in fair compensation where, as here, a much greater portion of the owner's railroad than necessary to provide service to the sole affected shipper is taken for storage of railcars, thereby depriving the owner of substantial revenues due to its own inability to store railcars, and impairing the owner's ability to serve its own customers adequately See 49 U S C § 11123(c)(2)(B)

Nevertheless, SAW hereby reluctantly agrees to accept \$45,116.32, an amount derived by WTLC-PYCO by means of application of the *Dardanelle* criteria, as full compensation for all

---

<sup>1/</sup> *Dardanelle & Russellville R Co - Tr Rts Compensation - Arkansas Midland R Co*, 1996 STB LEXIS 183 (Finance Docket No. 32625, decision served June 3, 1996)

periods of alternative rail service (WTLC-PYCO Opening Memorandum at 5) SAW takes that position solely to bring this litigation to an early conclusion.

As explained hereinafter, WTLC-PYCO have failed to provide justification for any offset to that amount

### **ARGUMENT**

#### **NO JUSTIFICATION HAS BEEN PROVIDED FOR ANY OFFSET TO THE AMOUNT DERIVED THROUGH APPLICATION OF THE DARDANELLE CRITERIA**

WTLC and PYCO claim nearly \$100,000 in costs for ordinary track maintenance and derailment-related expenses as an offset to the amount of \$45,116.22 that they derived through application of the *Dardanelle* criteria (Opening Memo at 5) Most of those costs were incurred after the feeder line sale was closed, on trackage which was not used in alternative rail service Such an offset would result in no compensation whatsoever for SAW despite WTLC's use of substantial segments of SAW's trackage for more than 21 months As shown hereinafter, no justification has been provided for any such offset, which would be entirely unjust and unreasonable in the circumstances

#### **1. Costs Incurred After Closing Of The Feeder Line Sale On Trackage Not Used In Alternative Rail Service**

*More than \$68,000 of the amount sought to be offset consists of costs incurred after the feeder line sale was closed, on trackage that was not used in alternative rail service See WTLC-PYCO Reply to Petition for Compensation, filed Jan 3, 2008, Ex B , Attachment*

Such an offset would clearly be improper Compensation for use of trackage in alternative rail service cannot be offset by costs incurred on other trackage not used in alternative rail service It would be plainly unfair to permit post-closing maintenance and derailment costs

to offset pre-closing compensation. WTLC and PYCO are well aware that SAW's Bill of Sale to PYCO conveyed the trackage "as is, where is." Allowing post-closing maintenance costs as an offset would thus violate the terms of closing. Moreover, allowing an offset for maintenance costs incurred on trackage not used in alternative rail service would violate the mutual release of claims that is an essential element of the Settlement Agreement between SAW and PYCO.

In any event, there is no support whatsoever for the contention of WTLC and PYCO that the post-closing maintenance and derailment-related costs were necessary as a result of SAW's failure to have adequately maintained its trackage. Thus, there is no evidence that any post-closing derailment occurred as a result of defective track conditions. The locations of the alleged post-closing derailments are not even identified. It is just as plausible that such derailments were attributable to negligent train operating practices. Similarly, there is no evidence that any of the post-closing costs for ordinary maintenance were required to bring defective track conditions into compliance with a particular FRA track safety standard. It is just as plausible that those post-closing maintenance costs were incurred as a result of PYCO's desire to maintain the trackage at a higher level than the adequate level at which it was previously maintained.

For any or all of the foregoing reasons, the Board should find that no justification has been provided for an offset of post-closing maintenance costs incurred on trackage not used in alternative rail service against compensation for use of trackage in alternative rail service.

**2. Deraiment Costs Incurred Prior To Closing On Trackage Used In  
Alternative Rail Service**

Most of the remaining amount sought to be offset (approximately \$27,800) is for costs related to a derailment in June, 2006 on trackage used to provide alternative rail service (WTLC-PYCO Reply to Petition for Compensation, filed Jan. 3, 2008, Ex. A at 1-2)

Contrary to WTLC's claim that this derailment occurred as a result of a defective switch (*id.* at 2), the fact is that the derailment occurred as a result of negligent WTLC train operation, i.e., "running through a switch." The derailment occurred on June 14, 2006. On June 16, 2006, SAW sent a communication to the Board, copy attached as Appendix 1, providing contemporary testimony by SAW's operating personnel that the derailment was caused by WTLC running through the switch. As explained in that communication, that contemporary evidence was provided so that WTLC and PYCO could not later claim that the derailment was caused by defective track conditions (Appendix 1 at 1-2). As SAW anticipated, WTLC now claims that the derailment was caused by a defective switch. That is flatly refuted by the contemporary evidence.

Even if that derailment had been caused by a defective switch, WTLC, not SAW, was responsible for maintenance of that switch. Attached to this Reply as Appendix 2 is a copy of 49 C.F.R. § 213.5, which is an FRA regulation governing responsibility for track maintenance to comply with track safety standards. Subparagraph (a) of that regulation provides that the owner of the trackage is responsible for track maintenance. Subparagraph (e) of that regulation provides that a rail carrier who is directed by the Board to provide service over the track of another rail carrier under 49 U.S.C. § 11123 is considered to be the owner of that track for the

purpose of administration of the FRA track safety standards. It necessarily follows that a rail carrier providing alternative rail service pursuant to 49 U.S.C. § 11123 has the responsibility to provide adequate track maintenance during the period of alternative rail service.

When the derailment under consideration occurred, WTLC had been providing alternative rail service over SAW's tracks for more than four months. Consequently, WTLC had a duty under 49 C.F.R. § 213.5(e) to adequately maintain the trackage being used to provide alternative rail service, including the switch alleged by WTLC to be defective. It necessarily follows that if the derailment is assumed to have been caused by a defective switch, it was WTLC, not SAW, that had the responsibility to adequately maintain that switch. Accordingly, WTLC, not SAW, would be responsible for the derailment-related costs that are assumed to have resulted from inadequate maintenance of the switch. That being the case, those derailment-related costs cannot be lawfully applied as an offset to compensation for SAW.

### **3. Miscellaneous Maintenance Costs**

There remains a request by PYCO to offset \$2,000 "expended to control weeds on the trackage in 2007" (WTLC-PYCO Reply to Petition for Compensation, filed Jan. 3, 2008, Ex. B, second unnumbered page), and a request by WTLC to offset \$1,072 expended "to manually spike a track switch in open and closed positions" (*id.*, Ex. A at 2).

No justification has been provided for those attempted offsets. PYCO has not identified whether the weed-control costs "in 2007" were incurred before or after closing of the feeder line sale, nor whether those costs were incurred on tracks used to provide alternative rail service or on other trackage. To the extent that such costs may have been incurred after the closing on trackage not used in alternative rail service, there is not a sufficient connection between those

costs and compensation for use of trackage in alternative rail service to warrant an offset of such costs. To the extent that such costs may have been incurred prior to the closing on trackage used in alternative rail service, WTLC, not SAW, was responsible for such costs by virtue of 49 C.F.R. § 213.5(e). Either way, an offset would be unjustified.

Similarly, an offset for the cost of manually spiking a switch has not been justified. WTLC has not identified the trackage on which the switch is located, nor when the switch was spiked. The same reasoning is applicable as was applied to the weed-control costs claimed by PYCO. If the switch was spiked after the closing on track not used in alternative rail service, there is not a sufficient connection to compensation for use of trackage in alternative rail service to justify the requested offset. If the switch was spiked during alternative rail service on trackage used to provide that service, WTLC is responsible for the costs incurred to spike the switch. Either way, an offset would be unjustified.

#### **CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the Board should award \$45,116.32 as compensation for WTLC's use of SAW's tracks in alternative rail service, as derived by WTLC and PYCO through application of the *Dardanelle* criteria, denying all requested offsets to that amount.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO  
P O Box 64299  
Lubbock, TX 79464-4299

Replicant



-

*Thomas F. McFarland*

THOMAS F McFARLAND  
THOMAS F McFARLAND, P C  
208 South-LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204  
(312) 201-9695 (fax)  
mcfarland@aol.com

*Attorney for Replicant*

DATE FILED February 25, 2008

-

## **APPENDIX 1**

216798

LAW OFFICE  
**THOMAS F. MCFARLAND, PC.**  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1112  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
*mcfarland@aol.com*

THOMAS F. MCFARLAND

June 16, 2006



By UPS overnight mail  
(Monday delivery)

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings

JUN 19 2006

Part of  
Public Record

Re STB Finance Docket No. 34802, *PYCO Industries, Inc. -- Alternative Rail Service*  
*-- South Plains Switching, Ltd. Co.*

Dear Mr. Williams

Alternative rail service in the above proceeding is scheduled to expire on June 25, 2006. South Plains Switching, Ltd. Co. (SAW) has petitioned the Board to allow alternative rail service to expire as scheduled.

SAW is hereby bringing to the attention of the Board that on June 14, 2006, West Texas & Lubbock Railway Company (WTL), the alternative rail service provider for PYCO, derailed 3 cars as a result of running through a switch on the property of Farmers Compress. WTL's only locomotive for providing rail service to PYCO and for SAW is located behind that switch, unable to provide rail service. Farmers Compress had released 6 cars for transportation by SAW on June 14, but SAW was prevented from providing that transportation due to the derailment. There were also 20 cars for Hanson Aggregates in the BNSF yard awaiting transportation by SAW, but WTL was unable to pick them up from the yard, so SAW was unable to deliver those cars to Hanson.

This derailment was caused solely by railroad error (by WTL running through a switch), not by any defective track conditions. Attached to this communication are statements by SAW employees Rodney Kern, Alan Davidson, Leonel Guerra, and Ruben Robles attesting to that fact.

This is brought to the Board's attention so that PYCO and WTL cannot falsely claim that the service failures for Farmers Compress and Hanson Aggregates were caused by defective

THOMAS F MCFARLAND

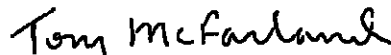
Vernon A Williams  
June 16, 2006  
Page 2

SAW track conditions or other SAW service failure The sole cause of this derailment and resulting service failure was negligence on the part of WTL.

PYCO has utterly failed to identify service failures on the part of SAW, except for a single day on November 28, 2005 due to locomotive failure that was repaired the following day More to the point. PYCO has utterly failed to provide evidence that there is a continuing service emergency at its plants, which is the sole ground for the drastic remedy of alternative rail service Instead, PYCO contends that SAW would be unlikely to provide adequate service to PYCO because SAW refuses to extend privileges to PYCO to which PYCO is not entitled by law (such as granting an easement to cross SAW's tracks) But SAW is fully capable of providing adequate rail service to PYCO without extending special privileges not required by law And that is not the standard for determining whether to continue alternative rail service in any event

Ten copies accompany the original of this communication

Very truly yours,



Thomas F McFarland  
Attorney for South Plains  
Switching, Ltd Co

TMcF kl wp8 011441trstb

cc Charles H Montange, Esq , by fax to 206-546-3739  
John D Heffner, Esq , by fax to 202-296-3939  
Gary McLaren, Esq , by fax to 806-785-2521  
Mrs Delilah Wisener, by e-mail  
Mr Dennis Olmstead, by e-mail

### Incident Report

Date: \_\_\_\_\_

Name of Witness: Rodney Kern

Write in your own words what happened:

I Rodney Kern have 20+ years Railroad exp  
in track & switching. I have done a thorough  
investigation on a derailment on 6-13-06 BY WTRC  
at Farmers complex. I find that human error  
at fault for this costly and interruption  
of service derailment. The south rounaround  
switch had being run threw south bound  
and the run back threw north bound with  
load cars causing this derailment.  
Proper inspection by man on point should of  
seen point was spit (or had been run threw)  
I am a certified track inspector for SLAL  
and have been since 1997. I do track inspection  
& reports. This switch had repairs made 4-14-06  
a switch stand and new foot lock installed, &  
switch adjusted. on 6-13-06 I personal  
line this switch and found no defects.

Signature: R L Kern 6-15-06

6-15-06

STATEMENT CONCERNING FARMERS SWITCH  
AT PLANT 3. ON 6-13-06 AT ABOUT 11<sup>45</sup> AM WE  
HAD OBTAINED AUTHORITY TO CROSSOVER FROM  
OUR MAIN LINE OVER BNSF MAIN LINE TO  
TRK 310 IN ORDER TO PLACE CARS ON SPOT IN  
PLANT 3 AT FARMERS. IN ORDER TO DO THIS  
WE USED SOUTH RUNAROUND SWITCH 3 TIMES IN  
ORDER TO SPOT CARS IN PLANT, A TOTAL OF SIX  
CARS I FOUND NOTHING WRONG WITH THE SWITCH  
AS IT HAD BEEN SERVICED JUST LAST WINTER

Alan  
Danson

06-15-06

MY NAME IS LEONET GUERRA AND I HAVE BEEN  
EMPLOYED BY SOUTH PLAINS LAMEDA RAILROAD  
AS OF MAY 2004. ON TUESDAY JUNE 13 AT  
APPROX. 1145 HRS THE SAW CREW (ALAN DAVIDSON,  
EUGEN ROBLIS, AND MYSELF) WENT TO SPOT CARS  
IN PLANT 3 AT FARMERS WE USED THE SOUTH  
RUNAROUND SWITCH APPROX 2-3 TIMES AT NO  
TIME DID WE HAVE ANY PROBLEMS WITH THE  
SWITCH, SWITCH POINTS OR TRACK. THIS STATEMENT  
IS TRUE AND CORRECT TO THE BEST OF MY  
KNOWLEDGE.

*Leonet Guerra*  
LEONET GUERRA

On 6-13-06, at 11:45

We went to Farmers and used so stated switches.

e repeatedly used these switches 3 or more times. We took 6 cars across the main and used these switches to spot 6 cars in Plant 3. All switches worked in order and we had no problems during this time.

6-15-06

Reuben Robles



## **APPENDIX 2**

[Code of Federal Regulations]  
[Title 49, Volume 4]  
[Revised as of October 1, 2003]  
From the U.S. Government Printing Office via GPO Access  
[CITE: 49CFR213.5]

[Page 94-95]

#### TITLE 49--TRANSPORTATION

#### CHAPTER II--FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

#### PART 213--TRACK SAFETY STANDARDS--Table of Contents

##### Subpart A--General

##### Sec 213.5 Responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, any owner of track to which this part applies who knows or has notice that the track does not comply with the requirements of this part, shall--

- (1) Bring the track into compliance;
- (2) Halt operations over that track; or
- (3) Operate under authority of a person designated under

Sec 213.7(a), who has at least one year of supervisory experience in railroad track maintenance,

[[Page 95]]

subject to conditions set forth in this part.

(b) If an owner of track to which this part applies designates a segment of track as "excepted track" under the provisions of Sec. 213.4, operations may continue over that track without complying with the provisions of subparts B, C, D, and E of this part, unless otherwise expressly stated.

(c) If an owner of track to which this part applies assigns responsibility for the track to another person (by lease or otherwise), written notification of the assignment shall be provided to the appropriate FRA Regional Office at least 30 days in advance of the assignment. The notification may be made by any party to that assignment, but shall be in writing and include the following--

- (1) The name and address of the track owner;
  - (2) The name and address of the person to whom responsibility is assigned (assignee);
  - (3) A statement of the exact relationship between the track owner and the assignee;
  - (4) A precise identification of the track,
  - (5) A statement as to the competence and ability of the assignee to carry out the duties of the track owner under this part; and
  - (6) A statement signed by the assignee acknowledging the assignment to him of responsibility for purposes of compliance with this part.
- (d) The Administrator may hold the track owner or the assignee or both responsible for compliance with this part and subject to penalties under Sec. 213.15.

(e) A common carrier by railroad which is directed by the Surface Transportation Board to provide service over the track of another railroad under 49 U.S.C. 11123 is considered the owner of that track for the purposes of the application of this part during the period the

directed service order remains in effect.

(f) When any person, including a contractor for a railroad or track owner, performs any function required by this part, that person is required to perform that function in accordance with this part.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2008, I served the foregoing document, Reply To  
Opening Memorandum, by e-mail on the following

-Charles H Montange, Esq  
426 N W 162<sup>nd</sup> Street  
Seattle, WA 98177  
*c montange@verizon net*

Gary McLaren, Esq  
Phillips & McLaren  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, TX 79413  
*gmclaren@sbcglobal net*

John D Heffner, Esq  
John D Heffner, PLLC  
1920 N Street, N W , Suite 800  
Washington, DC 20036  
*j heffner@verizon net*

Thomas F. McFarland

Thomas F McFarland